

EXHIBIT 5

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MASSACHUSETTS

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4 IN RE: PHARMACEUTICAL) MDL NO. 1456

5 INDUSTRY AVERAGE WHOLESALE) CIVIL ACTION

6 PRICE LITIGATION) 01-CV-12257-PBS

7 THIS DOCUMENT RELATES TO)

8 U.S. ex rel. Ven-a-Care of) Judge Patti B. Saris

9 the Florida Keys, Inc.)

10 v.) Chief Magistrate

11 Abbott Laboratories, Inc.,) Judge Marianne B.

12 No. 06-CV-11337-PBS) Bowler

13 (caption continues))

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15
16 Videotaped deposition of ROBERT A. NIEMANN

17 Volume 3

18
19
20 Baltimore, Maryland

21 Thursday, November 19, 2009

22 9:00 a.m.

<p style="text-align: right;">Page 600</p> <p>1 BY MR. TORBORG:</p> <p>2 Q. So the only instance that you recall AWP</p> <p>3 being an accurate indicator of acquisition cost was</p> <p>4 related to one orphan drug?</p> <p>5 A. I'm saying I believed it because I believed</p> <p>6 this gentleman I spoke to on the phone. I had no</p> <p>7 data. I had no proof.</p> <p>8 Q. But you just recall one particular drug</p> <p>9 where you believed that the AWP was an accurate</p> <p>10 reflection of acquisition cost; is that fair to say?</p> <p>11 A. I'm saying I have this memory of this nice</p> <p>12 gentleman talking to me about his -- I don't have a</p> <p>13 recollection of whether there were other drugs where</p> <p>14 the AWP was accurate. I just don't remember. I just</p> <p>15 remember this one conversation.</p> <p>16 Q. If we go to page 199, line 6, again, I'd</p> <p>17 like to read it into the record if you'd follow along.</p> <p>18 "Question: Has anybody ever in your time</p> <p>19 at HCFA expressed to you the belief that average</p> <p>20 wholesale price is a reliable indicator of the</p> <p>21 acquisition cost to physicians for drugs?"</p> <p>22 Ms. Oberembt interposed an objection. She</p>	<p style="text-align: right;">Page 602</p> <p>1 question, which is again on page 199, line 15. Mr.</p> <p>2 Cook's question was "In any of these conversations</p> <p>3 relating to the possibility of abandoning AWP and</p> <p>4 going to estimated acquisition cost, did any of the</p> <p>5 individuals that you've described ever raise concerns</p> <p>6 about what the consequences would be to beneficiaries'</p> <p>7 access to care or other program goals of going to</p> <p>8 EAC?"</p> <p>9 Ms. Oberembt interposed an objection. She</p> <p>10 stated "Objection on the grounds of the deliberative</p> <p>11 process privilege. I'll instruct you not to answer."</p> <p>12 Mr. Niemann, I'll ask you the question</p> <p>13 again. In any of these conversations relating to the</p> <p>14 possibility of abandoning the AWP and going to</p> <p>15 estimated acquisition cost, did any of the individuals</p> <p>16 that you've described ever raise concerns about what</p> <p>17 the consequences would be to beneficiaries' access to</p> <p>18 care or other program goals of going to EAC?"</p> <p>19 A. Yes.</p> <p>20 Q. And with whom do you recall having those</p> <p>21 discussions?</p> <p>22 A. That I don't remember. But -- I just don't</p>
<p style="text-align: right;">Page 601</p> <p>1 stated "I'm going to object to the extent you're</p> <p>2 asking him about conversations he had that involved</p> <p>3 deliberate process processes of the agency. I'm going</p> <p>4 to instruct you not to answer that too."</p> <p>5 Let me ask you again, Mr. Niemann, has</p> <p>6 anyone ever in your time in HCFA expressed to you the</p> <p>7 belief that average wholesale price is a reliable</p> <p>8 indicator of the acquisition cost to physicians for</p> <p>9 drugs?</p> <p>10 A. And again, I don't remember if anyone -- I</p> <p>11 just don't remember one way or the other.</p> <p>12 Q. And just so we're clear, when I used the</p> <p>13 term average wholesale price in my question what do</p> <p>14 you understand me to mean?</p> <p>15 A. The way it's used in the industry.</p> <p>16 Q. Which is how?</p> <p>17 A. Drug companies assign a sticker price to</p> <p>18 their drugs that are published in compendia like the</p> <p>19 Red Book. In other words, I assumed that you weren't</p> <p>20 using the word average, wholesale, price, but rather</p> <p>21 the term of art.</p> <p>22 Q. If you'd go, Mr. Niemann, to the next</p>	<p style="text-align: right;">Page 603</p> <p>1 remember who it was that -- probably more than one</p> <p>2 person.</p> <p>3 Q. Okay. And what do you recall about those</p> <p>4 conversations?</p> <p>5 A. Not much in the way of detail other than</p> <p>6 the agency is always concerned about getting the</p> <p>7 services we cover to the beneficiary. So it was that</p> <p>8 concern that somehow our beneficiaries wouldn't be</p> <p>9 provided the drugs if Medicare payment was</p> <p>10 insufficient.</p> <p>11 Q. Do you recall that being a predominant</p> <p>12 concern at the time you were at HCFA working on</p> <p>13 Medicare Part B drug payment issues?</p> <p>14 A. I don't understand that word "predominant."</p> <p>15 What do you mean? I mean, I know the word, but I</p> <p>16 don't understand what you mean. Predominant. What do</p> <p>17 you mean?</p> <p>18 Q. You said you understand the word</p> <p>19 predominant. What's your understanding of what that</p> <p>20 word means?</p> <p>21 A. Could you just explain your question</p> <p>22 better -- differently?</p>